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KHOO PENG LAI

v.

TAN AH HIN & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[SUIT NO: 26NCC-26-2011]
10 JUNE 2013

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COMPANY LAW: *Member's rights - Oppression - Whether company oppressed rights of minority shareholder - Whether fraudulent dissipation of minority's shareholding, gross mismanagement of company and conducting of affairs of company in disregard to minority's interests amounted to oppressive conduct - Whether minority shareholder entitled to relief under s. 181 Companies Act 1965 - Whether minority shareholder had locus standi to maintain s. 181 petition though divested of shareholding when petition filed*

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The petitioner was a minority shareholder in the eighth respondent ('Telemont'). In the instant action, he sought various reliefs under s. 181 of the Companies Act 1965 ('the Act') alleging that the majority shareholders of Telemont had oppressed his rights and acted against the best interests of the company. The petitioner beneficially held 10% of the shares in Telemont but discovered that, without his knowledge, his entire shareholding had been fraudulently transferred to the first respondent ('R1') and he was not paid any consideration for the same. He alleged that the transfer was effected by a forgery of his signature on the share transfer form. The petitioner served as director of Telemont for only two years but alleged that within that period, he was excluded from management decisions taken by the company; his views and interests were not heard and he was compelled to resign from all his directorships both in Telemont and its subsidiary companies. The petitioner alleged that from the time he resigned, the respondents failed to call for an Annual General Meeting ('AGM') of the company; disregarded his requests for information regarding the affairs of Telemont; kept him in the dark of the company's financial status; and failed to prepare and file in the audited accounts of the company. The petitioner sought an order, *inter alia*, that (i) the Registrar of Companies rectify the register to reflect the petitioner's shareholding in Telemont; (ii) an independent auditor be appointed to investigate and audit the company's accounts; (iii) the respondents jointly and/or severally repay to the company all monies found by the independent auditor to be unaccounted for, with interest; and (iv) the company's directors enable him to inspect all records of the company and that he be given leave to take such steps as were necessary to protect the company's interests.

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Held (granting reliefs sought by petitioner):

(1) Although the petitioner was no longer a shareholder of the company when he filed the petition, he had *locus standi* to bring the claim under s. 181 of the Act since one of his substantive complaints was that his shareholding had been dissipated without his consent. (paras 17 & 20)

(2) The court accepted the petitioner's contention that his shareholding in Telemont had been dissipated unlawfully without his consent. That, in itself, was a ground of oppression. Based on the testimony of the government forensic handwriting specialist and the court's own examination and comparison of the petitioner's signatures, the court was satisfied beyond reasonable doubt that the petitioner's signature on the share transfer form had been forged. The respondents failed to adduce any evidence from the person who allegedly witnessed the petitioner's signature on the share transfer form; neither was there any evidence to show the petitioner was paid for the transfer of his shares. (paras 34, 35, 38, 39, 40, 42, 43 & 44)

(3) There was no reasonable explanation for the respondents' continued failure to call for an AGM of the company or to file the audited accounts of Telemont and its subsidiaries for five years since the petitioner's resignation from the company. Under s. 143 of the Act, directors of a company were duty-bound to call for an AGM annually and their responsibilities concerning the preparation and filing of audited accounts annually were prescribed under ss. 165 to 170 of the Act. The failure of the board of directors in these respects amounted to mismanagement, which also amounted to oppressive conduct for the purposes of s. 181. (paras 45, 50, 52, 53 & 54)

(4) By failing to entertain the petitioner's requests for certain information concerning the company, the first to seventh respondents had conducted the company's affairs in a manner which disregarded the petitioner's interests. (paras 59 & 62)

Case(s) referred to:

Chiew Sze Sun & Anor v. Cast Iron Products Sdn Bhd & Ors [1994] 1 CLJ 157 HC ***(refd)***

Dato' Ting Check Sii v. Datuk Hj Mohamad Tufail Mahmud & Ors [2008] 7 CLJ 315 HC ***(refd)***

Kow Kek Leong v. KL Team Development Sdn Bhd & Ors [1998] 5 CLJ 328 HC ***(refd)***

Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & 5 Ors And Another Application [1994] 1 LNS 73 HC ***(refd)***

Malaysia Plastics Sdn Bhd v. United Overseas Bank (Malaysia) Bhd [2012] 4 CLJ 997 HC ***(refd)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(foll)***

Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor [2010] 6 CLJ 721 FC ***(refd)***

Re Chi Liung & Sons Ltd; Tong Chong Fah v. Tong Lee Hwa & Ors [1967] 1 LNS 145 HC ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Ting Teck Sie v. Wong Sen Chiew & Ors [2005] 6 CLJ 495 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 143, 165, 166, 167, 168, 169, 170, 181(1), (a), Evidence Act 1950, ss. 45, 73(1), 114(g)

For the petitioner - Harvinderjit Singh; M/s Vin Partnership
For the respondents - Faizal Hassan; M/s Edlin Ghazaly & Assocs

Reported by Ashok Kumar

JUDGMENT

Hanipah Farikullah J:

[1] The petitioner sought an order under s. 181 of the Company's Act 1965 alleging that the majority shareholders of the eighth respondent Telemont Sdn Bhd ('Telemont') had undertaken a series of act which amounts to oppression of his rights as a minority shareholder in the company and which are against the best interest of the company.

Background Facts

[2] Based on the evidence before me, the facts are as follows:

(i) Telemont Construction Sdn Bhd (Company No. 609021-D) ("Telemont Construction"); and

(ii) Modal Jati Berhad (Company No. 103729-X) ("Modal Jati")

A copy of the search conducted in the Companies Commission of Malaysia on Telemont Construction is annexed to this petition and marked as "P7".

A copy of the search conducted in the Companies Commission of Malaysia on Modal Jati is annexed to this petition and marked as "P8".

(iii) The wholly owned subsidiaries of Modal Jati, which came under the control and direction of element:

(a) MJB Forestry Sdn Bhd (Company No. 663624-W) ("MJB Forestry");

(b) Jejaka Makmur Sdn Bhd (Company No. 313510-W) ("Jejaka Makmur");

(c) Alifya Forestry Sdn Bhd (Company No. 384623-H) ("Alifya Forestry"); and

(d) Sindiyan Sdn Bhd (Company No. 388706-T) ("Sindiyan").

Copy of the searches conducted at the Companies Commission of Malaysia on MJB Forestry, Jejaka Makmur, Alifya Forestry and Sindiyan are annexed to this petition and marked as "P9", "P10", "P11" and "P12" respectively.

[3] The principal business of Telemont is as an investment holding company for several subsidiaries which were at the material time involved in logging, farming, sheep rearing and other agricultural activities.

[4] The authorised capital of Telemont is RM50,000,000 divided into ordinary shares of RM1 each. The issued and paid-up capital of the Telemont presently stands at RM31,500,000 *vide* the allotment of 31,500,000 ordinary shares.

[5] The petitioner is a chartered accountant by profession and was at all material times the holder of 20% of the paid up capital of Telemont (6,300,000 ordinary shares). Out of this 20%, the petitioner contended that he is beneficially entitled to half of the shares (10%) whereas the balance was held on trust for the first respondent ("Rodger Tan"). The petitioner was therefore a minority shareholder of Telemont.

[6] The petitioner contended that Rodger Tan was at all material times the controlling mind and will of the majority shareholders and in control of the board of directors. The first respondent is also the second cousin of the petitioner.

[7] The second to seventh respondents are all members of the board of directors of Telemont. The second respondent is also the holder of 23% of the shares in Telemont (7,245,000 ordinary shares).

[8] The balance of 57% of the shares in Telemont are held by a company called SKKPJ (Tanah Merah) Sdn Bhd ("SKKPJ"), which is a company owned by Rodger Tan (first respondent).

A **Alleged Oppressive Acts**

[9] The petitioner alleged that the oppressive acts of the respondents are as follows:

B (i) Contrary to the initial arrangement upon which the petitioner was invited to participate in the management of Telemont, Rodger Tan began to run Telemont in a dictatorial and authoritarian manner without heed to the petitioner's advise, suggestions and interests. As a result of this, the petitioner was effectively excluded from the management of Telemont and was compelled to resign from all his C directorships in the Telemont and its subsidiaries in March 2007;

(ii) From the time the petitioner resigned from the management of Telemont and its subsidiaries in 2007, the respondents have failed to call for any Annual General Meetings. The respondents have also kept the petitioner completely in the dark of the financial status of D Telemont and have failed to file in audited accounts of Telemont for several years;

(iii) Based on the matters above, the petitioner had made several queries regarding the affairs of Telemont to the respondents. Despite this, E the respondents had completely failed and neglected to provide the petitioner with any information whatsoever;

(iv) Unbeknownst to the petitioner, his entire shareholding in Telemont was dissipated without his consent, knowledge and approval in November 2009. The petitioner's entire shareholding was transferred F to Rodger Tan *vide* a forged Form 32A and the petitioner was not paid any consideration for the same.

Reliefs

G **[10]** The reliefs sought by the petitioner are as follows:

(i) An order for the Registrar of Companies to rectify the register to reflect the petitioner's actual shareholding in the company.

(ii) That an independent auditor be appointed to investigate and audit H the accounts of the company from 2005 to the date of the order.

(iii) An order that the first to eighth respondents jointly and/or severally repay the company all sums found by the independent auditor to be unaccounted for, with interest.

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(iv) That the directors of the company be ordered to enable all the records of the company to be inspected by the petitioner and the petitioner be given leave to take such steps as necessary to protect the interests of the company.

(v) As an alternative, an order that the first to the eighth respondents jointly and/or severally compensate the petitioner for the loss of his shareholding in the company at a value to be determined by this Honourable Court.

The Law

[11] It is necessary to remind oneself of the law on s. 181 of the Act.

[12] Section 181(1) of the Act states as follows:

> s. 181. Remedy in cases of an oppression.
>
> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
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> (b) that some of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

[13] The leading authority on the scope of s. 181 of the Act is *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170. In this case, Lord Wilberforce in his judgment held that:

> Secondly, for the case to be brought within section 181(1)(a) at all, the complainant must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority

A rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v. Elder & Watson Ltd* [1952] B SC 49): their Lordships would place the emphasis on "visible". And similarly "disregard" involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v. Drysdale* [1925] SC 311, 315). Neither "oppression" nor C "disregard" need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

D **[14]** It is pertinent to note that in the case of *Dato' Ting Check Sii v. Datuk Hj Mohamad Tufail Mahmud & Ors* [2008] 7 CLJ 315 the court held as follows:

> Section 181 relief is not relevant in cases where there is disagreement to managerial decisions or policy decisions. Such conduct does not E necessarily constitute oppression or disregard of a member's interests. Section 181 remedy is only applicable to case where the oppressive conduct affects the petitioning member *qua* member. The oppression complained of must be continuing at the time the action is brought. The relief should be sought expeditiously. In *Re Senson Auto Supplies Sdn Bhd* [1987] 1 LNS 110, Edgar Joseph Jr (as he then was) opined:
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> > First, I regard with considerable scepticism the *bona fides* of the petitioners in presenting this petition in order to obtain relief from alleged oppression, having regard to the alternative prayer in it for "rescission of all those shares allotted to the petitioners on April 30, 1986, and repayment of $25,381 paid therefore". G There is authority for saying that even if the directors or majority shareholders have been guilty of improper or unreasonable conduct so that there appears to be a *prima facie* case for relief, it will be refused if the real purpose of the petitioners is to obtain payment of money owed by the Company (see *Re Bellador Silk Ltd* [1965] 1 All ER 667).

H **[15]** In the case of *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application* [1994] 1 LNS 73; [1994] 2 MLJ 789, Anuar J (as he then was) cited *Re Trivoli Freeholds Ltd* at p. 452, where Menhennitt J said:

I > Whether or not a company is being conducted in a manner oppressive to certain shareholders depends upon all the circumstances and it is not possible to attempt a universal definition. However, in the kind of

situation which arises in this case and having regard to the matters relied upon by the petitioner and the supporting members, the following elements are I think included in the matters postulated in the section and are also established by authorities:

(1) Those dealings that the affairs of the company have been conducted in a manner oppressive to them must establish, as one element, conduct which the Court of Appeal has recently restated in the case of *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 at page 1059, as conduct which is unfair or, to use the expression adopted by Viscount Simonds in *Scottish Cooperative Wholesale Society Ltd v. Meyer* [1959] AC 324 at page 342, 'burdensome, harsh and wrongful' to the other members of the company or some of them and lacks that degree or probity which they are entitled to expect in the conduct of the company's affairs: see *Scottish Co-operative Wholesale Society Ltd v. Meyer and Re HR Harmer Ltd* [1959] 1 WLR 62.

[16] In *Dato' Ting Check Sii v. Datuk Hj Mohamad Tufail Mahmud & Ors* [2008] 7 CLJ 315, the court stated that:

A member of the company would be able to bring himself within the section if he could show that the value of his shareholding in the company had been seriously diminished or jeopardised by reason of a course of conduct on the part of those persons who have *de facto* control of the company.

Whether The Petitioner Has *Locus Standi* To Make A Claim Under s. 181 Of The Company's Act

[17] The first issue that has to be considered is whether since the petitioner is no longer a shareholder of the company when he filed this petition, he therefore no longer has *locus standi* to bring a claim under s. 181 of the Act.

[18] In relation to this issue, the petitioner has averred in his petition that unbeknownst to the petitioner, his entire shareholding in Telemont was dissipated without his consent, knowledge and approval in November 2009. The petitioner alleged that this entire shareholding was transferred to Rodger Tan *vide* a forged Form 32A and he was not paid any consideration for the same. In this regard, the petitioner seeks for a rectification of the company's register to reinstate his dissipated shares.

[19] On this point, it is relevant to make reference to the Federal Court decision in the case of *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716 where the court stated as follows:

Here we have a fact pattern where the appellant's membership of the company had been terminated in circumstances which are being challenged by him on substantial grounds. The substantial ground he

A complains of is the deprivation of his membership in the Company. He says that the circumstances attending this deprivation of membership falls within the framework of s. 181(1)(a) and (b). It is the company, acting through its board, that had deprived the appellant of the status of a member. Can the company be now heard to say that the appellant is no longer a member and is therefore disentitled from
B moving the Court under s. 181 of the Act and from questioning that very deprivation in proceedings brought under the section? We think not. For it does not lie in the mouth of the alleged wrongdoers to say that the appellant has no ground to stand on after having cut the very ground from under his feet.

C **[20]** In the light of the above authority applying it to the facts of the present case, I am of the view that since one of the substantive ground of the petitioner's complain is the dissipation of his shares without his consent, therefore the plaintiff has the locus to file this petition as his complain would fall within the scope of s. 181(a) of the Act.

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[21] I will next deal with the issue with regards to the actual shareholding of the petitioner and the alleged transfer or dissipation of the petitioner's shares in the company.

The Petitioner's Actual Shareholding/The Unlawful Dissipation Of
E **The Petitioner's Shares In Telemont**

[22] The petitioner contended that out of 20% of the shares in Telemont, he is beneficially entitled to half of the shares (10%).

[23] According to the petitioner, these shares were allotted to him at
F the behest of Rodger Tan in consideration of the petitioner's past services to Rodger Tan and as recognition for his contribution to the company.

[24] The petitioner's position on his shareholding is corroborated by
G the following:

(i) the fact that the percentage of shares of the petitioner, namely 20% was consistently maintained when Telemont first increased its share capital from 1 million to 6.5 million and subsequently from 6.5 million to 31.5 million;

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(ii) in the petitioner's written note to Rodger Tan dated 28 March 2007, the petitioner himself recorded the agreement between them on the petitioner's shareholding of 10%:

> But of course, you did mention thereafter that my investment
I in Telemont shall not be less than 10% but no mention that the 4 million was for that additional 5%.

[25] It is also noted that in the learned counsel for the respondents opening statement at the outset of the trial, the respondents took the following position:

> The Petitioner had initially been given 5% shares of the 8th Respondent without any consideration by the First Respondent. This holding was later increased to 20% also without consideration. However, in this respect, the Petitioner only held 10% of shares outright and the balance, he was holding on trust for the 1st Respondent.

[26] At the outset of the cross-examination, Rodger Tan specifically admitted that the opening statement contains the respondents' case in this matter.

[27] However, later on during the cross-examination, Rodger Tan changes his position and asserted that the petitioner was only entitled to 5% of the shares.

[28] It is my finding that Rodger Tan is not a credible witness. He kept on changing his position on the petitioner's shares. I will deal with this matter in the later part of my judgment in greater detail. Hence, I accept the petitioner's version of the story. I find the petitioner consistent in his evidence.

[29] Based on the above reasons, in my view the petitioner is the registered holder of the 20% of the paid up capital of the company. Out of this 20% the petitioner is beneficially entitled to 10% and the balance is held on trust for the first respondent.

Unlawful Dissipation Of The Petitioner's Shares

[30] The petitioner contended that his signature on the transfer form (P2) was forged. The petitioner pleaded that he had signed a blank share transfer form on the request of Rodger Tan on Rodger's representations that the form was needed to allocate shares later on.

[31] In support of the petitioner's allegation that his signature was forged, the petitioner relied on a chemist report by PW1, a government forensic handwriting specialist serving in the Jabatan Kimia Malaysia. The report (exh. DPK 1 of encl. 25) stated that the petitioner's signature was forged.

[32] The petitioner considered that the dissipation of 6,300,000 shares has been done in a *mala fide* manner using unlawful means. In this regard, the petitioner contended that he was effectively been ousted as a shareholder of the company without his knowledge or consent. This was a ground of oppression.

[33] With regards to the petitioner's signature on P2. This is what PW1 said in her conclusion:

> On comparison, I found that the questioned signature "X" showed significant differences in handwriting characteristics from the specimen signatures "DX". Hence, I am of the opinion that this questioned signature was most probably not written by the writer of the specimens.

[34] Based on s. 45 of the Evidence Act 1950, I must say that the opinion of PW1 are relevant facts to be considered. However, being opinion evidence, such evidence can never be conclusive and serves primarily to assist the court (see *Malaysia Plastics Sdn Bhd v. United Overseas Bank (Malaysia) Bhd* [2012] 4 CLJ 997).

[35] Pursuant to s. 73(1) of the Evidence Act 1950, I have made an examination and comparison between the signature of the petitioner in P2 and with his sample signatures on the following documents to ascertain whether the petitioner actually signed the document in P2:

(a) p. 26 encl. 1 vol. 1 (in 2011).

(b) p. 113 encl. 1 vol. 2 (in 2006).

(c) p. 123 encl. 1 vol. 2 (in 2006).

(d) p. 130 encl. 1 vol. 2 (in 2006).

(e) p. 146 encl. 1 vol. 2 (in 2006).

(f) p. 147 encl. 1 vol. 2 (in 2006).

(g) p. 153 encl. 1 vol. 2 (in 2006).

(h) p. 154 encl. 1 vol. 2 (in 2006).

(i) p. 290 encl. 1 vol. 2 (in 2004).

(j) p. 13 exh. TAH 8 encl. 10 (in 2005).

(k) p. 5 exh. TAH 16 encl. 10 (in 2005).

(l) p. 4 exh. TAH 17 encl. 10 (in 2006).

(m) exh. TAH18 encl. 10 (in 2007).

(n) exh. TAH18 encl. 10 (in 2007).

(o) exh. TAH18 encl. 10 (in 2007).

(p) exh. TAH18 encl. 10 (in 2007). A

(q) exh. TAH18 encl. 10 (in 2007).

(r) exh. TAH18 encl. 10 (in 2007).

(s) encl. 14 (in 2012). B

(t) exh. DPK10 encl. 14 (in 2006).

(u) exh. DPK11 encl. 14 (in 2011).

(v) exh. TAH27 encl. 17 (in 2005). C

(w) exh. TAH31 encl. 17 (in 2005).

(x) encl. 24 (in 2012).

(y) exh. DPK25 encl. 25 (in 2002). D

(z) encl. 25 (in 2012).

[36] After careful perusal by visual comparison, I accept with PW1's evidence that the line quality, structural details and the formation of loop are substantively different between the petitioner's signature on P2 and E his sample signatures.

[37] Further, it is safe for this court to conclude that there are some variations between the petitioner's sample signatures but the variations are not substantively different. In my view, it is natural, variations may occur in any signature. F

[38] Hence, I am satisfied beyond reasonable doubt that the alleged signature of the petitioner on P2 is not his signature and thus, it is a forged signature.

[39] Contrary to what is reflected in the Forged Form 32A, the G petitioner also contended that his signature was also never witnessed by the seventh respondent (Lim Neow Hwa).

[40] As I could see it, one person who could have thrown light as to whether it was the petitioner's signature on P2 is Lim Neow Hwa. H However in this case, the respondents failed to file any affidavit by Lim Neow Hwa that she had witnessed the signing of the alleged transfer of the shares.

[41] Thus, the irresistible conclusion that can be drawn is that the evidence of Lim Neow Hwa would be adverse to the respondents' case. I (s. 114(g) of the Evidence Act 1950 applied).

[42] Apart from the forgery, the said Form 32A reflected that consideration sum for the transfer was RM6,300,000. However, there is no evidence filed by the respondents which shows that the petitioner was paid any of these monies. In relation to this, on 18 August 2011 the petitioner had lodged Police Report No. Bandar Baru Klang/00778/11 to report the matters to the authorities.

[43] Based on the above reasons, I accept the petitioner's submission that his 6,300,000 shares had been dissipated unlawfully without his consent.

[44] The unlawful transfer of a shareholder's shares without his consent has been long recognised as a ground of oppression. (See *Re Chi Liung & Sons Ltd; Tong Chong Fah v. Tong Lee Hwa & Ors* [1967] 1 LNS 145; [1968] 1 MLJ 97).

Oppressive Act No. 2 - No Audited Accounts And Calling Of AGM

[45] It is not disputed that the respondents have failed to call for an Annual General Meeting and have failed to file the audited accounts of Telemont. It has been five years since the petitioner left the management of the company in 2007.

[46] On this point, the respondents claimed that the petitioner was in charge of the accounts and had caused failures for the respondents to prepare the audited accounts and calling of AGM.

[47] However, it is observed that there are inconsistencies in the evidence of Rodger Tan with regards to the petitioner's role. The inconsistencies of Rodger Tan's evidence *inter alia* are as follows:

(i) In encl. (10) Rodger Tan alleged that the petitioner had no substantial role and was only in charge of the farming activities.

(ii) However, in encl. 17, he sought to impute that the petitioner was in charge of the accounts of the company.

(iii) During cross-examination, Rodger Tan continually shifted his position on the petitioner's role as follows:

(a) Rodger Tan testified that the petitioner was supposed to be substantially involved in the management of Telemont but did not do so.

(b) Rodger Tan disagreed that the petitioner was involved in more than farming activities.

(c) Rodger Tan agreed that the fourth respondent (Te Soh Peng) was in charge of accounts of Telemont.

(d) Rodger Tan disagreed that the petitioner was not in charge of the accounts in Telemont.

(e) When his discrepancies were put to him, Rodger Tan said that the petitioner was not in charge of accounts of Telemont but only the auditing.

(f) Rodger Tan admitted that the petitioner was involved in a 'small part' of the management of the company.

[48] In the light of the above reasons, Rodger Tan's evidence cannot be accepted by the court and the petitioner's version of his role is to be accepted. (*Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 followed).

[49] In fact, there has been no explanation from the fourth respondent or the seventh respondent as to why the accounts have not been prepared.

[50] Further, it is undisputed that the petitioner was only a director of Telemont for two years and he had resigned in 2007. There has been no reasonable explanation for the continued failure of filing the accounts and audits of Telemont and its subsidiaries for five years since the petitioner's resignation.

[51] Contrary to Rodger Tan's averment that the petitioner was in charge of the auditing in Telemont, the documentary evidence disclosed by the respondents themselves show that an accounting firm called Gomez & Co was appointed as auditors *vide* a director's resolution. It is undisputed that the petitioner's firm was called Khoo & Co.

[52] Under s. 143 of the Act, the directors of a company are duty bound to call for an AGM annually.

[53] Under ss. 165 to 170 of the Act, the responsibility of the directors are:

(i) to file annual returns of the company annually after calling for an AGM;

(ii) to have accounts prepared and audited annually and filed with the Registrar of Companies;

(iii) to keep such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.

[54] Authorities have shown that the failure of the board of directors of a company to have the accounts of a company audited and to have an AGM called annually amounts to mismanagement. This also amounts to an oppressive conduct for the purposes of s. 181 of the Act.

[55] In *Chiew Sze Sun & Anor v. Cast Iron Products Sdn Bhd & Ors* [1994] 1 CLJ 157 it was held as follows:

> In this case the Petitioner's complained of the failure of the Respondents to submit accounts for 5 years. The Court held that the company was being mismanaged and this was oppressive to the petitioner's interest.

[56] In the case of *Ting Teck Sie v. Wong Sen Chiew & Ors* [2005] 6 CLJ 495 on a similar complaint the court held:

> The respondents' failure to lodge statutory reports further aggravated the situation. The 1999 Annual General Meeting had tabled the statement for the year 1996 whilst 1997 and 1998 had not been prepared. This was clearly mismanagement of the financial affairs of the company.
>
> The Respondents were ordered to buy out the Petitioner's shares.

[57] In *Kow Kek Leong v. KL Team Development Sdn Bhd & Ors* [1998] 5 CLJ 328, the court stated that:

> The court held that the powers, right and responsibilities of a person as a shareholder, director and as a member of the board of directors is separate and independent of each other. The management, including the accounts, of the company is the collective responsibility of the board of directors. Every shareholder is entitled to receive a copy of the audited accounts as a shareholder.

[58] With regards to the respondents' contention that since the petitioner himself did not cause the accounts to be filed during his two years as a director, he cannot complain about this. The petitioner submitted that this fact was never raised in any of the affidavits filed by the respondents. Thus, I find it unnecessary to consider this submission of learned counsel for the defendant as it was never pleaded by the respondents in the affidavits filed by them. In this present case, the

evidence is by way of affidavits and it is trite law that parties are bound by what they have pleaded and cannot raise new issues in their submission.

Oppressive Act No. 3 - Failure To Provide The Petitioner With Information

[59] The petitioner wrote a letter dated 24 June 2010 to the board of directors of the company requesting for certain information to be provided to him. In relation to this, the information requested *inter alia* are as follows:

(i) The KFH facility had been restructured by the board of directors without the knowledge or consent of the petitioner. Hence, the petitioner sought confirmation on the details of the restructuring agreed to by the first to seventh respondents and the present status of repayments by Telemont;

(ii) As no AGM have been called and no audited or unaudited accounts of Telemont and its subsidiaries have been circulated to the petitioner, the petitioner sought an explanation from the board of directors regarding their failure to adhere to the statutory guidelines;

(iii) The petitioner also requested for a suitable time and date for him to be able to inspect the management accounts of Telemont and its subsidiaries for the years ending 2006, 2007, 2008 and 2009; and

(iv) The petitioner sought disclosure of all litigation (existing of threatened) in which Telemont and/or its subsidiaries may be involved in.

[60] Rodger Tan during cross-examination stated that the petitioner's letter dated 24 June 2010 was sent to Telemont's Kota Bharu address and he has not seen it until the petition was received.

[61] I find that there is no merit in the respondents' submission. In this regard, the evidence clearly shows that the letter was sent to the official address of Telemont.

[62] In the light of the above reasons, in my view, by failing to provide the petitioner with information of the company this conduct amount to the affairs of the company have been conducted in a manner which disregards the interest of the petitioner.

A **The Dictatorial And Authoritarian Attitude Of Rodger Tan**

[63] A further matter raised by the petitioner in that contrary to the initial arrangement upon which the petitioner was invited to participate in the management of Telemont, Rodger Tan began to run Telemont in a dictatorial and authoritarian manner without heed to the petitioner's advise, suggestions and interests. As a result of this, the petitioner was effectively excluded from the management of Telemont and was compelled to resign from all his directorships in the Telemont and its subsidiaries in March 2007.

[64] Learned counsel for the defendant submitted that allegations of mismanagement are not contained within the scope of s. 181. However in my view, this contention is incorrect as the Federal Court in *Pan Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor* [2010] 6 CLJ 721 held that serious management of a company's business can amount to unfairly prejudicial conduct.

[65] In *Corporate Powers Accountability* (2nd edn., 2002), the learned author opined as follows:

> Under s. 181 of the Act, a distinction is drawn between mere managerial shortcomings and serious mismanagement. Losses resulting from managerial shortcomings are a part of the total mix of commercial risks which shareholders have to accept. Section 181 of the Act is not intended to confer jurisdiction upon the court to supervise the qualitative competency of the management and give remedy to all sorts of defaults in management. On the other hand, serious mismanagement which puts the business and assets of a company into jeopardy is within the meaning of s. 181 of the Act. Mismanagement of a serious nature usually involves conduct breaching the standard of care and skill which are expected from the management.

[66] Furthermore, from the evidence submitted, I find that the plaintiff had failed to proof that Rodger Tan conduct the management of the company in dictatorial and authoritarian manner.

[67] It is also settled law that s. 181 reliefs are not relevant in cases where there is disagreement to managerial decisions or policy decisions.

Conclusion

[68] Based on the above reasons, I made the following orders:

(i) an order for the Registrar of Companies to rectify the register to reflect the petitioner's actual shareholding in the company (prayer (2) of encl. 1);

(ii) that an independent auditor be appointed at the costs and expense of the company to investigate and audit the accounts of the company from 2005 to the date of the order (prayer (4) of encl. 1) and to prepare proper accounts of the company;

(iii) that the directors of the company be ordered to enable all the records of the company to be inspected by the petitioner and the petitioner be given leave to take such steps as necessary to protect the interests of the company (prayer (7) of encl. 1);

(iv) an order that the first - seventh respondents jointly and/or severally repay the company all sums found by the independent auditor to be unaccounted for, with interest (prayer (5) of encl. 1).

[69] I further award costs of RM40,000 to the petitioner.